

PENAL ABOLITION

INTRODUCTION

Penal abolition is the rejection of the penal system, that is, the current system of punishment and incarceration in response to crimes committed against the state, as a form of social control and community maintenance. Penal abolition challenges prison systems that use policing and the courts to control populations as a means of solving social problems. Penal abolition fights against the overlapping interests of government and private industries that are in favour of greater government surveillance and increased power to state authorities as a means of solving social issues. Penal abolitionists believe that imprisonment does little to change the social conditions that led to the crime being committed. Moreover, isolating prisoners in solitary confinement can worsen their physical and mental condition, and individual circumstances. State resources being used to run punishment mechanisms are stripped away from meeting community needs and issues that foster criminogenic environments. Hence, penal abolition is recognised as a social vision with a goal of eliminating imprisonment, policing, surveillance and creating lasting alternatives to punishment and imprisonment.

Penal abolitionists stress that the current system fails to reduce crime, and does not promote community safety. They contend that the penal system is an oppressive mechanism of social control that discriminates between social groups through varying factors including sex, ethnicity and socio-economic class, and further undermines already-disadvantaged individuals by enabling certain parties to abuse the penal system for profit, politics, and power.

The present social and justice structures do not provide substantial scope for reform. There is a misconception that the ultimate outcome of the justice process must be a penalty. While penal abolition does not avoid public policy, nor does it ignore the need for discipline and does not support abolishing the justice system altogether, by approaching the issue with a humanistic and a socialistic approach, it is evident that penal abolition could alleviate problems caused by the current system, including prison overcrowding, mistreatment of mentally ill patients, high recidivism rates, prison violence, self harm and self inflicted deaths in prisons.

Abolition is a broad strategy and not an isolated system. It does not encourage oppression or maintaining inequalities through punishment. Instead, the penal abolition presents long term goals to stop the construction of new prisons, promotes restorative justice, aims to end solitary confinement and death penalty and focuses heavily on crime prevention.

A HISTORY OF PENAL ABOLITION

Penal abolitionists seek to reform the system's current position on punishment and government institutionalisation to focus more on rehabilitation.¹ The origins of this movement can be traced back to the 1973 Walpole Prison Uprising, in which the inmates of Walpole Prison formed a union to protect themselves from guards, end behavioural modification programs, and advocate for greater visitation rights, work assignments and the right to education and healthcare.² The union ended racially motivated violence within the prison and helped reduce recidivism and homicide rates. They were also successful in gaining more visitation rights and work programs. Their advocacy marked the birth of the prison abolition movement.³

THE PURPOSE OF THE PENAL SYSTEM

10 REASONS FOR PENAL ABOLITION⁴

1. INEFFECTIVENESS OF THE PENAL SYSTEM

Research indicates that the penal system is an ineffective means of apprehending, rehabilitating and deterring individuals from crime.⁵ In fact, the penal system inhibits effective crime prevention, as popular beliefs that incarceration reduces crime results in more expenditure on punitive policies instead of crime prevention.

Moreover, there is little evidence to suggest that prisoners are deterred from re-offending on the basis of incarceration. On the contrary, in Australia, the rate of recidivism is particularly high – 44.8% of prisoners incarcerated in 2014-2015 returned to prison within 2 years.⁶ In NSW, the proportion of offenders who re-offend within 12 months of release from prison increased from 33.0% in 2010 to 41.0% in 2015. This rate of re-offending for Indigenous persons incarcerated in NSW is even higher, increasing from 42.4% in 2009 to 51.0% in

¹ Robin F Shaw (2009) Angela Y Davis and the Prison Abolition Movement, *Contemporary Justice Review*: 101-104

² Peter Glderloos (2010) *Anarchy Works*

³ Jamie Bisonette (2008) *When the prisons ran Walpole: a true story in the movement for prison abolition*, Cambridge : South End Press

⁴ A list adapted from the work of Michael Coyle, Assistant Professor in the Department of Political Science in California State University

⁵ Michaela Whitborn, 'Prison alternative leads to sharp drop in re-offending rates, new figures reveal', *The Sydney Morning Herald* (online), 11 October 2017

<<https://www.smh.com.au/national/nsw/prison-alternative-leads-to-sharp-drop-in-reoffending-rates-new-figures-reveal-20171011-gyypqf.html>>.

⁶ Sentencing Advisory Council, 'Released Prisoners Returning to Prison', 1 February 2018 <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-statistics/released-prisoners-returning-to-prison>>.

2015.⁷ Victims of crime are not provided with effective remedies by the penal system. They do not have any standing to participate in criminal proceedings and only operate as witnesses to incidents relating to an offense. The public perception, that punishing an offender gives the victim a sense of “justice”, is misguided.

2. MISUSE OF THE PENAL SYSTEM

The commercialised nature of the penal system, in which prison services are privatised, results in the exploitation of low-income communities and communities of colour. This intersection between state and corporate interests in the prison industry, including private police, prison facilities and lawyers is referred to as the prison-industrial complex, and this complex encourages social control, surveillance and imprisonment as a means to contain and torture prisoners. The prison-industrial complex fuels the penal system, in turn creating a cycle of abuse.⁸ Public fears of safety and crime are politically exploited to gain public support through expansion of the penal system, encouraging the myth of ‘solving’ crime and violence through incarceration in a process known as penal populism. Penal populism shifts the focus away from the rehabilitation of prisoners and underlying social issues, instead fostering a culture of control and harsher punishment in the legal system.⁹ Politicians use the ‘tough on crime’ rhetoric to their political advantage, despite the detriment to society.¹⁰

- Penal system as profession/career: Many “professionals” profit from the penal system through their careers as lawyers and academics, and argue for the continuation of the system notwithstanding its obvious shortcomings.

3. THE PENAL SYSTEM AS A MECHANISM FOR CONTROLLING THE UNDERPRIVILEGED

The construction of the penal system is far more concerned with social paradigm thinking than community maintenance. For example, in some prisons inmates are housed according to ethnicity, ostentatiously to reduce ‘racial tension’. However, there is little evidence to support the effectiveness of this practice; in fact, it may be counterproductive in that it deters socialising between different ethnic groups. The penal system is increasingly shifting away from rehabilitation and ensuring social welfare, to the current model in which the penal system is a means of social control.¹¹ This process has also led to discriminatory policy and segregation, in addition to the incarceration of society’s most vulnerable people.¹² While most people break the law once within their lifetime, only a selection of such persons becomes

⁷ NSW Bureau of Crime Statistics and Research, *New South Wales Recorded Crime Statistics*, (2017) 42.

⁸ Jason Lydon, ‘A Theology for the Penal Abolition Movement’ (2011) *A Journal of Social Justice* 23(3).

⁹ Victor L Shammass, ‘Who’s afraid of penal populism? Technocracy and ‘the people’ in the sociology of punishment’ (2016) *Contemporary Justice Review* 19(3).

¹⁰ <http://www.austlii.edu.au/au/journals/BalJINTLawSoc/2007/5.pdf>

¹¹ David Garland, *The culture of control: Crime and social order in contemporary society* (2002) Chicago: University of Chicago Press.

¹² Giovanni Cellini (2016) Social work and social control in the penitentiary system: an empirical study in northern Italy, *European Journal of Social Work*, 19:1, 92-105

subject to the penal system. Therefore, it is accurate to postulate that the modern penal system does not respond to 'crime' per se, but the crimes committed by certain peoples.

4. THE DELINEATION BETWEEN PEOPLE

The penal system disproportionately disenfranchises more vulnerable populations such as communities of colour and low-income communities, fostering a system that punishes individuals for their social location. Those who are mentally ill, poor or people of colour are disproportionately denied equal rights and opportunities through their disproportionate incarceration. Aboriginal and Torres Strait Islanders especially are disproportionately represented in the criminal justice system, being 13 times more likely to be incarcerated than their non-indigenous counterparts.¹³ Furthermore, Aboriginal deaths in custody have been an enduring system in the criminal justice system, with the Royal Commission into Aboriginal Deaths in Custody revealing the extent of the current injustice of the penal system, with 15% of all deaths in custody being Indigenous prisoners, despite Indigenous people representing 3% of the general population. The Commission concluded that there are too many Aboriginal people in incarceration, and made several recommendations, including:¹⁴

- 87. Arrest people only when no other way exists for dealing with a problem
- 92. Imprisonment should be utilised only as a sanction of last resort.
- 339. Initiate a formal process of reconciliation between Aboriginal people and the wider community

As the Commission highlights, focus should be put on the rehabilitation and reconciliation of prisoners as opposed to incarceration. The penal system fundamentally fails to adequately focus on the rehabilitative aspects of criminal justice, instead exacerbating the complex social issues that often form the source of criminal problems. The marginalisation and social isolation of prisoners alienates them from the rest of the society and perpetuates the negative stigma of criminals and ex-criminals.

5. PENAL SYSTEM – A SOCIAL PARADIGM RATHER THAN COMMUNITY MAINTENANCE

Penalism embodies a construction that has more to do with social paradigm thinking, which importantly and powerfully entails the sorting of humans by indexes of difference, e.g. sex, race/ethnicity, class, etc.) than community maintenance. Despite the general criminologist consensus that imprisonment is an ineffective crime prevention measure, the penal system still remains the most widely accepted model around the world. The current adoption of the penal system highlights the reactionary ideology behind accepting the current social quo and its status as a social paradigm, as opposed to effective crime prevention.

6. HIGH COSTS

¹³<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Imprisonment%20rates~12>

¹⁴ <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>

In Australia, the imprisonment of youths and mentally ill criminals costs taxpayers over \$200,000 annually per inmate.¹⁵ Considering the high recidivism rate that follows release, the high costs involved with the penal system raises the question of its practicality and feasibility. Notably, the US “Criminal Justice System” has been, and continues to be, the most expensive government program in history. California’s penal system takes more money from the state budget than public education, and it is predicted that Australia will follow the US model unless active steps are taken to prevent the expansion of the penal system in the country. A cost-benefit analysis shows that tax revenues are maintaining this punitive system yet producing little, if no results. Jobs are being created in areas of high risk and low skill requirement, while they could be created in the areas of development, health and infrastructure. Recently, NSW allocated a budget of \$3.8 billion for building six more prisons around NSW including the suggested Illawarra high security unit.¹⁶ This money would be better spent on hospitals, TAFEs and other educational institutions designed to promote pro-social behaviour and prevent crime in the first place.

7. VIOLATIONS OF HUMAN RIGHTS AND CIVIL LIBERTIES

The penal system is extremely flawed in its treatment of civil liberties and human rights, having provided no just solution to issues such as wrongful imprisonment, denial of civil liberties, and mistreatment of prisoners with mental illness.

WRONGFUL CONVICTIONS

In New South Wales, there is no legal entitlement to compensation for those who have been wrongfully imprisoned, despite Article 9, schedule 5 of the International Covenant on Civil and Political Rights which states: ‘Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation’. Currently in NSW, the only avenue for compensation of some sort is *ex gratia* payments from the government, that is, ‘out of grace’ payments. As the government is not obliged to give *ex gratia* payments and may choose to give them on its own accord or by request of the wronged party, this potentially leaves those wrongfully imprisoned without any compensation for the time spent and money lost during their period of incarceration. Refusal of *ex gratia* payments is not appealable, further highlighting the potential injustice done by the government.

The only other alternative is to pursue a common law claim and prove a case against the state. However, not only is the process difficult, but the chances of the outcome being an *ex gratia*

¹⁵ Morgan A. 2018. *How much does prison really cost? Comparing the costs of imprisonment with community corrections*. Research Reports No. 5. Canberra: Australian Institute of Criminology. <https://aic.gov.au/publications/rr/rr5>

¹⁶ Lucy McNally, ‘NSW budget: \$3.8b to fund thousands of extra beds in crowded jails’, *ABC News* (online), 16 June 2016, <<http://www.abc.net.au/news/2016-06-16/nsw-govt-to-fund-thousands-extra-beds-to-help-crowded-jails/7515336>>.

payment is low. The process of seeking payment is also very time consuming and costly, with all the *ex gratia* payments being made with no fault admitted by the state.¹⁷

POOR TREATMENT OF FORENSIC PATIENTS

Mental health patients possess the same human rights as other individuals of society. Mental health facilities have a duty to care for patients in a way that is both humane and respectful, however, due to the unbounded discretionary power that they are granted, this obligation often remains unfulfilled. Staff are frequently empowered to force vulnerable patients to take medication whenever they deem it appropriate, and it is often used as a management tool to sedate patients, rather than to aid their recovery.

CIVIL LIBERTY VIOLATIONS

When people enter the prison system, they are denied fundamental human rights, including the right to vote, freedom of expression and freedom of association. Voting is a fundamental human right in Australia, upheld through legislated compulsory enrolment in place since 1924. However, often little effort is made to ensure prisoners have the opportunity to enrol. Even though federal law currently allows for those being incarcerated for less than three years to vote in Federal elections, the case of *Roach v Electoral Commissioner*, the High Court found that the 2006 amendment to the *Commonwealth Electoral Act 1919* (Cth), was a direct infringement of the right to vote that is enshrined in the Constitution. The right to vote is a way for citizens to have an active voice in shaping society; not allowing prisoners to vote further alienates them in the public sphere.

8. OPPOSING THE INADEQUACIES OF THE TRIAL PROCESS

70% of accused persons plead guilty in Australia prior to trial.¹⁸ This is problematic as these persons do not necessarily understand the implications of this decision. Significant pressure may be exerted by the prosecution by threatening the accused with a substantially heftier charge unless they enter a guilty plea, for instance murder instead of manslaughter. The mechanisms currently in place to discourage cases going to trial may be endangering the quality of justice for accused persons.

9. THE CREATION OF 'BEHAVIOURAL ISSUES'

Incarceration exacerbates existing harms and creates new ones. It has scientifically been proven that human physiology and psychology can be significantly altered by isolation and confinement. Psychotic behavioural episodes tend to begin with signs of disorientation and disruptive behaviour.¹⁹ Thus the penal system tends to breed criminal behaviour rather than working to cure it or provide a solution.

¹⁷ Adrian Hoel. 2008. *Compensation for wrongful conviction*. Trends & issues in crime and criminal justice No. 356. Canberra: Australian Institute of Criminology.
<https://aic.gov.au/publications/tandi/tandi356>

¹⁸ Lisa Durnian, 'The rise of the guilty plea', *The Prosecution Project*, Research Brief 14, <https://prosecutionproject.griffith.edu.au/the-rise-of-the-guilty-plea> (27 June 2015, viewed 29 July 2016).

¹⁹ J. I. Pagel and A. Chouker, 'Effects of isolation confinement on humans-implications for manned space explorations' (2016) 120 *Journal of Applied Physiology* 1449, 1449.

10. HANGING ON TO THE COLD HAND OF 'RETRIBUTION'

Retributive justice has fallen out of favour among criminology academics and policymakers in certain progressive nations. Restorative justice has gained popularity for its effectiveness in reducing recidivism rates. Restorative justice has been capable of achieving the outcomes the retributive system was unable to. It goes to the core of the problem and attempts to solve the reason for the crime and the crime itself instead of only focusing on the criminal. The crime itself must be prevented, inhibited, eradicated for a safe community and a crime free state instead of the criminal. Hence, it is only accurate to say that the modern penal project does not respond to 'crime,' but chooses who shall constitute the participants of the so-called 'Criminal Justice System.'

A REALISTIC APPROACH

Penal abolition is only the beginning. Penal Abolition does *not* require naive or romantic perceptions of human beings, disregard for human taste for social control and community building work, disregard for what is called 'public safety,' or pretence that human beings in community are not accountable to each other.

Penal abolitionists do not have all the answers on how to manage the unimaginably complex matters that penalty and the so-called 'Criminal Justice System' attempt to address. They only want to start by being honest about the penal project and its immense failures.

CULTURES OF PUNISHMENT

ALTERNATIVES FOR DEALING WITH DELINQUENCY

Currently, community problems are cross-fertilised and festering within our warehouses called prisons. A need for open discourse and exchange of ideas is required in order to move away from this failed approach. It is important to keep in mind that most crime is a symptom of underlying problems within the broader community.

One possible mechanism for dealing with disturbing behaviour involves greater tolerance. This can be achieved through inspiring good behaviour through hope rather than intimidation through fear and punishment, as this is ineffective. A new approach to such behaviour can be established through a combination of transformative justice (restorative justice and justice reinvestment) and the building of community support systems via peer mentoring and professional training.

The concept of justice reinvestment is in its infancy in criminological theory; however, it is already proving effective in addressing criminal conduct. Firmly related 'restorative justice'

model of criminal justice,²⁰ justice reinvestment focuses on channelling the government funding currently pumped into a failing justice system into community projects designed to foster pro-social and anti-criminogenic behaviour.

Another mechanism, particularly in preventing violent behaviour, is investment in expanding health care programs such as anger management, therapy for addictions and mental health. The recipient of these programs should not be determined through governmental control and one should not have to commit a crime to be eligible for treatment.

AN ACADEMIC PERSPECTIVE ON PENAL ABOLITION

REFORM INSTEAD OF ABOLITION

REFERENCES

²⁰ Shadd Maruna, 'Lessons for justice reinvestment from restorative justice and the justice model experience: Some tips for an 8-year-old prodigy' (2011) 10 *Criminology & Public Policy* 661.